PROPORTIONALITY AND PRETENSE

PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS. By Aharon Barak.[1] New York, N.Y.: Cambridge University Press. 2012. Pp. xxvi + 611. $55.00 (paper).

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> The rule of law requires that state action that limits rights be justified in judicial review proceedings.
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> Proportionality analysis is the best means of determining justification for rights limitations.
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> Courts are uniquely well positioned to conduct proportionality analysis and should not defer to the other branches of government.
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> Judicial review is democratic and courts should not be concerned about its legitimacy.

Aharon Barak is a staunch proponent of judicial review and these are some of the claims he makes in *Proportionality: Constitutional Rights and their Limitations,* his contribution to the burgeoning literature on proportionality. Proportionality is an analytical framework used by courts in many countries in determining whether or not limitations on the exercise of rights are justified, and therefore constitutional. Barak's agenda is ambitious: he is, as he describes it, "attempt[ing] to provide a universal understanding of the concept of proportionality in constitutional democracies" (p. 4). According to Barak, proportionality analysis can be used to resolve the most pressing problems a country may face—even threats to the continued existence of the country itself. Can Israel erect a

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security fence[3] or limit family reunification involving non-Israeli spouses[4] in an attempt to protect its citizens from terrorism? On Barak's account the judiciary can, and must, answer these questions and more without any concerns about the legitimacy of judicial review.

Barak is a jurist of considerable distinction whose legacy is admired by some and abhorred by others. To some he was the exemplary wise jurist who helped protect individual rights and keep state power in check; to others he was an activist judge who usurped democratic power.[5] Views about his legacy differ widely, but there is no doubting his importance. Under his leadership the Supreme Court of Israel established the constitutional stature of Israel's Basic Law: Human Liberty and Dignity (1992),[6] and the decisions he wrote in interpreting and applying the Basic Law have left an indelible stamp on the law of Israel.[7] Now in his retirement, Barak writes for an international

3. HCJ 2056/04 Beit Sourik Vill. Council v The Gov 't of Israel 58(5) IsrSC 807 [2004] (Isr.).

4. HCJ 7052/03 Adalah—The Legal Ctr. for the Rights of the Arab Minority v Minister of the Interior, [2006] (Isr.).

5. U.S. Supreme Court Justice Elena Kagan once introduced Barak at an academic gathering as her "judicial hero," describing him as "the judge or justice in my lifetime whom, I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice." In contrast, Judge Robert Bork said Barak "may be the worst judge on the planet, the most activist" (quoted in Sheryl Gay Stolberg, *Praise for an Israeli Judge Drives Criticism of Kagan*, N.Y. TIMES, June 24, 2010, http://www.nytimes.com/2010/06/25/us/politics/25kagan.html?_r=0). *See also* Richard Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53; *cf.* Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism* 49 HARV INT. L.J. ONLINE 1 (2007).

6. The Basic Law: Human Liberty and Dignity was passed by the Israeli Knesset as ordinary legislation, but was interpreted by the Israel Supreme Court under Barak's leadership as supreme law authorizing the Court to invalidate inconsistent legislation (CA 6821/93 United Mizrahi Bank v Migdal Coop. Vill. 49(4) IsrSC 221 [1995] (Isr.)). This development was signaled by Barak in 1993 in *A Constitutional Revolution: Israel's Basic Law*s, 4 CONST. F. 83 (1992-1993). Barak wrote:

> By virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status much like the situation in the United States, Canada and many other countries. This is clear with regard to *Basic Law: Freedom of Occupation,* which the Knesset itself entrenched by stipulating that it may not be changed except by a Basic Law passed by an absolute majority of Knesset members. It is less clear in the case of *Basic Law: Human Dignity and Freedom,* which was not so entrenched; but the minimalist interpretation of that Basic Law requires, in my opinion, that any ordinary legislation which contradicts the provisions of the Basic Law without stating explicitly that it is doing so will not be valid.

Id. at 83. Barak concluded "Now that we have been given the tools we will do the work." *Id.* at 84.

7. Much has been written about Barak's influence and the evolution of judicial power in Israel. *See, e.g.* Ran Hirschl, *The Political Origins of Israel's Juristocracy*, 16 CONSTELLATIONS 476 (2009); Markus Wagner, *Transnational Legal Communication: A*

audience. Although he acknowledges his predecessors in proportionality scholarship, and in particular the work of Robert Alexy,[8] Barak is keen to demonstrate his differences with them and to promote his own approach to proportionality analysis.

Barak exalts the courts as the ultimate guardians of constitutional rights and downplays the many and profound differences that exist between countries that have adopted bills of rights and proportionality review.[9] The book is a tour of constitutional law, with Barak discussing case law and secondary literature from a wide range of countries including Australia, Canada, Germany, Ireland, Israel, India, New Zealand, South Africa, and the United States, with references to constitutions and statutes from Albania, Moldova, Portugal, Romania, Spain, Switzerland, and Turkey along the way. Few will be familiar with the full breadth of the material cited, so one has to take Barak's account of the law on faith.[10] But there is reason for caution: Barak affects an easy familiarity with matters of great subtlety and nuance in jurisdictions in which he has neither experience nor expertise.[11]

Barak invites readers to draw a familiar conclusion: elected legislators are either insufficiently concerned about rights or are ignorant of them, and are prone to making reactionary judgments in the face of crises real and imagined. Thus, it falls to judges to protect democracy by requiring that governments justify their actions. In Barak's world, *legal* justification—justification in

Partial Legacy of Supreme Court President Aharon Barak, TULSA L. REV. 437, 456–460 (2012).

8. Alexy is considered the leading German proportionality theorist. See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers, trans., Oxford Univ. Press, 2002) (1986). Barak summarizes his differences with Alexy in the book (pp. 5–6).

9. The spread of proportionality analysis is discussed by Alec Stone Sweet and Jud Mathews in *Proportionality Balancing and Global Constitutionalism,* 47 COLUMBIA J. TRANS. L. 73 (2008).

10. James Allan and I discuss some of the problems with comparative constitutional law in James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts,* 43 SAN DIEGO L. REV. 1 (2006); *see also* James Allan, Grant Huscroft & Nessa Lynch, *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11 OTAGO L. REV. 433 (2007) (discussing the inflationary ("ratcheting-up") effect of judicial citation of comparative constitutional rights).

11. For example, Barak writes: "Today, the recognition of positive constitutional rights is widespread in constitutional democracies (p. 423)." He cites a single case from the Supreme Court of Canada, *Gosselin v Quebec (Attorney General)* [2002] 4 S.C.R. 429 (Can.), for the proposition. But that case is noteworthy for its *rejection* of the proposition Barak suggests it stands for (majority of the Court rejecting argument that the *Canadian Charter of Rights and Freedoms* establishes positive obligation on the state to guarantee adequate living standards, *Gosselin*, at ¶¶ 81–83).

judicial review proceedings—is all that really matters and there is no room for doubt about its importance. Nor is there any reason to doubt the legitimacy of judicial review and, as a result, no reason for judges to limit its scope or to be deferential in exercising judicial authority. "[I]t is essential to understand," he insists, "that, once a legal system has chosen—either explicitly or implicitly—to recognize the institution of judicial review of the constitutionality of statutes, the critique leveled at the adoption of judicial review in the first place should not emerge again when judicial review is applied" (p. 382). Courts simply *must* determine whether limits on rights are justified and, if they are not, simply *must* strike them down. To fail to do so is to abdicate judicial responsibility.

Barak argues that proportionality is the best means to make sense of all of this—the best approach to determining whether or not limits on rights are justified and the best means of protecting constitutional rights—and sets out a detailed approach to each step in the analysis. For all of the pretense, however, proportionality analysis suffers from the same basic problem as all other approaches to judicial review: it cannot provide answers that cannot reasonably be denied. Judicial review is problematic no matter what approach to rights analysis is adopted, and proportionality analysis gives rise to a unique range of problems that Barak cannot overcome.

The problems begin with the rigid bifurcation of definition and justification on which proportionality analysis is premised. Rights must be defined before justification for limits on them can be assessed, but no matter how broadly a particular right is defined the real protection it affords depends on how easy or difficult it is to justify the establishment of limits on the right.[12] As we will see, the importance of the justificatory inquiry establishes an incentive for courts to minimize or even avoid questions of constitutional text and its interpretation at the definitional stage—the traditional focus of judicial review. As the focus of judicial review shifts the scope of rights expands, and with expanded rights comes an expansion in the scope of judicial review, as more and more state action is found to establish limits on the rights the courts have expanded. But while proportionality analysis leads to an expansion of rights and broadens the scope of

12. *See, e.g.*, Bradley W. Miller, *Justification and Rights Limitations*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 93 (Grant Huscroft, ed., 2008); GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009) .

judicial review, it limits the bases on which limits on rights may be justified. It prescribes an ostensibly objective, evidence-based assessment that all but bars the state from defending rights limitations on moral bases.[13] Barak is comfortable with this state of affairs but there is no reason the rest of us should be. It is nothing to which we agreed—or would have agreed—in establishing a democratic constitutional order.

WHAT RIGHTS DO WE HAVE?

The first question that must be asked in any rights-based constitutional order is: what rights do we have? This ostensibly simple question is not likely to be answered by the text of a bill of rights—at least, not definitively—because the text of bills of rights is worded vaguely. In order to determine whether a particular right is protected by a bill of rights, courts must determine what the vaguely worded text of a bill of rights means. Only after this has occurred can they go on to determine whether a particular right has been limited by state action, and only then does the burden of justification arise.

Barak pays more attention than many proportionality proponents to questions of constitutional interpretation and reiterates the "purposive" approach to constitutional interpretation he detailed in previous work.[14] There is something here for everyone. On one hand, Barak favors progressive, evolving conceptions of constitutional rights (pp. 46–47);[15] on the other hand, he disavows overly expansive interpretation: the constitution "is not like clay in the sculptor's hands" (p. 49).[16] Text matters, he insists; at the same time,

13. Bradley W. Miller, *Proportionality's Blind Spot: 'Neutrality' and Political Philosophy*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Huscroft, Miller & Webber, eds., forthcoming, 2014).

14. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi, trans., 2005).

15. Citing Hunter v Southam Inc, [1984] 2 S.C.R. 145 (Can.).

16. "A constitution is not a metaphor. The Constitutional text is not a non-binding recommendation. It is not like clay in the sculptor's hands. The idea of constitutional amendments through judicial interpretation—rather than through the mechanisms set by the constitution itself—is merely a metaphor" (p. 49) (internal citation omitted). Elsewhere in the text, Barak states that a change in the scope of a right may come "only via constitutional amendment" or, he adds immediately, "a change in the court's interpretation of the constitutional text" (p. 23). There is a significant issue here about when interpretive change is tantamount to change to the constitution itself. *See* Grant Huscroft, *Vagueness, Finiteness, and the Limits of Interpretation and Construction*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 203 (Grant Huscroft & Bradley Miller eds., 2011).

however, so does "implicit text"—constitutional text he describes as written in "invisible ink" (p. 50).

The suggestion here is that the drafters of a bill of rights agreed to include particular text but to hide it from view. Why would they do so? And even assuming that they did, why should judges give effect to their subterfuge? The invisible ink metaphor is inapt, however, for invisible ink is apparent to anyone that has the right medium for viewing it. Only judges can see the text Barak has in mind.[17] Thus, judges can exercise discretionary authority to read rights into a bill of rights. The extent to which this is legitimate is, of course, controversial, unless we assume that there is no distinction between the constitution and what judges say *about* the constitution.[18] Despite his insistence that constitutional text matters, what Barak describes as text-specific rights turn out to be "framing" rights, each of which includes a "bundle of rights"[19]—again, recognized by judges—that are also to be regarded as explicit rather than implicit rights.[20]

Barak's conception of the interpretive task is at odds with much of what we know about bills of rights. The text of bills of rights is likely to be chosen carefully—indeed, painstakingly—in order to achieve the agreement in the political community necessary to adopt bills of rights. The drafters of bills of rights think that the words they choose matter; they think that their agreements to include particular rights and to omit others will be understood and respected. To be sure, agreement to the adoption of a bill of rights is often achieved at the expense of clarity or specificity:

17. Barak's citation of decisions of the High Court of Australia finding an implicit right of political expression in the Australian Constitution is telling. Barak notes in passing that reasonable people may disagree about the boundaries of implicit text, but the disagreement is more profound than he acknowledges: It goes to the very existence of implicit text, especially in Australia, which deliberately chose not to constitutionalize the protection of rights and has since rejected proposals to adopt even a statutory bill of rights. See Goldsworthy's forceful critique: Jeffrey Goldsworthy, *Unwritten Constitutional Principles*, *in* EXPOUNDING THE CONSTITUTION, *supra* note 12, at 277.

18. United States Supreme Court Chief Justice Hughes' offhand comment—"We are under a Constitution, but the Constitution is what the judges say it is," is neither descriptively apt nor a normatively desirable conception of constitutionalism, but it is sometimes cited as authority. *See, e.g.*, PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (2013), ch 5.5(b); *cf.* Grant Huscroft, *Thank God We 're Here*, 25 SUPREME COURT L. REV. (2d) 241, 249–52 (2004).

19. Barak cites Spanish secondary authority (C.B. PULIDO, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES (2007)) (p. 51 N. 27).

20. Barak refers to framing rights and the rights to which they give rise as "parent and child" rights. (p. 51).

important provisions in bills of rights may be worded more or less vaguely in order to facilitate their adoption.[21] This allows agreement to be reached at a level of abstraction—to broad concepts rather than particular conceptions, about which there may be considerable disagreement. Once a vaguely worded bill of rights is adopted, the question is: how will judges see their role?

One thing is certain: no serious conception of constitutionalism and the rule of law allows judges to treat vaguely worded provisions as open-ended—allows them to exploit generality and abstraction in order to ascribe any normatively desirable meaning they choose to the text. Bills of rights may be worded vaguely, but vagueness is not the same as radical indeterminacy. We can concede that rights may be *underdeterminate*, in that their text does not fully determine the scope of the protection they provide, but judicial interpretive discretion is not unfettered.[22] If it is to be exercised legitimately, it must be anchored in not only the text of the bill of rights but also the agreement that it reflects.

That is so because bills of rights effect a "constitutional settlement" in the community as to how rights are to be dealt with in the constitutional order. Bills of rights are not generic; they are specific to particular legal communities and their provisions reflect the values, traditions, and legal norms of the communities that adopt them. To adopt a bill of rights is to adopt a *particular* bill of rights—a bill of rights that includes some rights, and perhaps particular conceptions of them, and omits other rights, leaving their protection to the ordinary democratic processes.[23] I suspect that Barak is unsympathetic to the constitutional settlement idea because Israel's constitutional experience is so different. But if he is unsympathetic, Barak understands the need to at least affect concern with questions of legitimacy, and so there is a nod to originalism and other constraints on judicial interpretive discretion. Constitutional text cannot be understood, he says, without taking into account the intentions of their

21. Jeremy Waldron describes this as "finess[ing] major disagreements." Jeremy Waldron, *Do Judges Reason Morally?*, *in* EXPOUNDING THE CONSTITUTION, *supra* note 12, at 38, 63.

22. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma,* 54 U. CHI. L. REV. 462, 473 (1987).

23. I say *omits*, rather than *excludes*, because bills of rights list the rights they include but rarely exclude rights from their protection explicitly. They are, nevertheless, finite documents, because they do not include all possible rights. I set out the argument more fully in Grant Huscroft, *Proportionality and the Relevance of Interpretation*" *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13.

creators and the original understanding (pp. 58, 63). But this is qualified immediately: interpretation is an objective as well as subjective enterprise, and the objective purpose is to be accorded greater weight.

Barak describes his purposive approach—considering the past but not allowing it to control—as well-accepted by many Western legal systems and laments the refusal of American courts to adopt it. American constitutional law is, he writes, "in a state of crisis . . . the entire constitutional system is hanging in the balance . . . [a] dangerous situation, which may tear apart the legal system . . . ." (pp. 62–63). This will come as a considerable surprise to American scholars. So too will Barak's approach to interpreting rights, which results in very broad conceptions of rights—so broad that rights come to protect much that is valueless, if not harmful. Consider the example of theft. Is there a constitutional right to steal? The answer is yes, Barak says, because this is a right that flows from human autonomy, which he assumes democratic constitutions must protect (pp. 42–44).[24] There is no need for concern, however; Barak assures us that proportionality analysis will accommodate the required criminal law prohibition. The claim is, in essence, that judges can be trusted to act reasonably in cutting down to size the rights whose scope they are prone to exaggerate.[25]

But no matter how good a job judges are thought likely to do, the important point for Barak is that judges must be allowed to determine the matter. If it important to justify state action, and proportionality analysis determines justification, it follows that the opportunities for courts to engage in proportionality analysis should be maximized. The best way to do this is to adopt broad interpretations of rights. After all, the more broadly a right is interpreted, the more likely it is that state action will come into conflict with it and proportionality analysis will be required in order to determine whether the state action is justified.

Some have sought to normalize, if not advocate, this relationship. For example, in the context of an argument for

24. Barak states that he assumes, along with Alexy, "that a democratic constitution recognizes a general right to private autonomy." This is an enormous assumption, and although Barak acknowledges that it is the subject of dispute, he simply puts the dispute to one side (p. 42 n. 86).

25. Barak's example is taken to the extreme by Möller, who writes of a right to commit murder. *See* Kai Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13. *Cf.* Grégoire C.N. Webber, *On the Loss of Rights*, in the same volume.

proportionality as the "ultimate rule of law," David Beatty suggests that we ignore the particularity of bills of rights: "Traditional first-generation rights of liberty and equality are all any judge who is inclined to read constitutional texts to give effect to their overarching values and purposes really needs."[26] Proportionality, says Beatty, "entails very little interpretation and makes the concept of rights almost irrelevant";[27] "when judges rely on the principle of proportionality to structure their thinking the concept of rights disappears. . . . They are really just rhetorical flourish."[28] "[P]roportionality transforms judicial review from an interpretive exercise, giving meaning to the words of a constitutional text, into a very focused factual inquiry about the good and bad effects of specific acts of the state."[29] Mattias Kumm makes a similar argument:

> [A] rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. . . . The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement.[30]

If rights infringements are no more than triggers for justificatory evaluations, there are, Kumm asserts, "no obvious reasons" for defining rights narrowly.[31]

I can think of one: broad interpretations of rights change the constitutional order by rendering all legislation vulnerable to constitutional challenge. Given the broad interpretation thesis, legislation will be found to limit rights routinely, no matter what a bill of rights says (or does not say). This establishes a burden of legal justification on the state, and if this burden is not met

26. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 138 (2004).
27. *Id*. at 160.
28. *Id*. at 171.
29. *Id*. at 182–83.
30. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS OF HUM. RTS. 150 (2010). Kumm acknowledges the compatibility of Rawlsian public reason with proportionality reasoning, but denies that his argument depends on Rawls' conception of public reason. *Id*. at 150 n. 46.
31. *Id*. at 151.

the law will be found unconstitutional. It is easy to be sanguine about all of this if it is assumed that it is easy to establish proportionality to the satisfaction of a court. But what reason is there to make this assumption?

Here we come to the nub of the matter: the protection that constitutional rights afford ultimately depends on how easy or difficult courts make it for the state to meet the burden of justification. Proportionality proponents are in a tough position at this point. It is difficult to insist that broad interpretations of rights are necessary given the importance of submitting state action to justification, only to make it easy for the state to meet the burden of justification and so render the exercise meaningless.

Kai Möller's approach highlights this problem. Möller seeks to make a virtue of interpretive slackness, as he not only acknowledges "rights inflation" but advocates it. The point of rights, he says,

> is not to single out certain especially important interests for heightened protection. Rather, it is to show a particular form of respect for persons by insisting that each and every state measure which affects a person's ability to live her life according to her self-conception must take her autonomy interests adequately into account.[32]

For Möller then, bills of rights establish a single right: a right to do whatever one wishes, and as a result all government action necessarily establishes limits on this right and must be justified.

Would anyone ever agree to adopt a bill of rights that included such a right? This appears not to matter in the least. For Möller, as for Kumm and Beatty, the concept of rights is all but meaningless. On their account, bills of rights are really not bills of *rights* at all. Instead, they are simply requirements of proportionality in state action—a universal obligation that state action be justified in accordance with a proportionality test.

It is impossible to reconcile this conception of bills of rights with the constitutional settlement concept I outlined above. The Beatty/Kumm/Möller approach renders the constitutionality of all validly enacted legislation contingent on judicial approval, on the basis that it satisfies a proportionality standard that may be

32. Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13.

applied in a more or less exacting manner.[33] Kumm answers the obvious criticism rhetorically: "The question is not what justifies the 'countermajoritarian' imposition of outcomes by non-elected judges. The question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no reasonable justification."[34]

To accept this approach we must accept that attempts to limit the scope of rights by careful drafting, and hence to limit the scope of judicial review, are doomed to fail. The process of constitution writing—negotiating, compromising, and ultimately agreeing on the adoption of constitutional text—is, in essence, a waste of time: Judicial review simply cannot be constrained by the text of a bill of rights.[35] The best that can be hoped for is that courts will exercise their judicial review powers modestly or deferentially.

This is not an attractive conception of democratic constitutionalism, but for all of the problems with it Beatty/ Kumm/Möller are at least candid in advocating it. Their goal is clear for all to see: they like judicial review and seek to expand its scope. They regard interpretive theory as a sort of annoying legalism courts are free to ignore,[36] and advocate expansive interpretations of rights as a means of achieving an expansion in the scope of judicial review authority. Does Barak share this agenda?

If he does not advocate it it is doubtful that he opposes it. My sense is that the judge in him precludes him from endorsing the radical approach to constitutional rights that Beatty/Kumm/ Möller advocate. But Barak's approach goes almost as far and delivers congenial results: broad interpretations of rights and increased, if not unlimited, scope to engage in proportionality review. And as we will see, Barak's approach has the potential to go further, given his antipathy to the concept of deference.

33. I say "more or less" because most (but not all) proportionality proponents assume that proportionality analysis will be applied deferentially. The topic of proportionality and deference is discussed below.

34. Kumm, *Socratic Contestation*, *supra* note 30, at 170 (internal footnote omitted).

35. Indeed, the ability of the people to amend their constitution may turn out to be illusory as well. Barak flirts with the notion of "unconstitutional constitutional amendments": some amendments are "so fundamentally contrary to the basic structure of the constitution itself that they may no longer be considered 'fit' for the process of a constitutional amendment" (p. 31).

36. Kumm deprecates legalism—a focus on text, history, and precedent—as characteristic of originalist as well as living constitutionalism approaches, and describes a "vice of thoughtlessness based on tradition, convention or preference[.]" See Kumm, *Socratic Contestation*, *supra* note 30, at 163 & n. 44.

THE NATURE OF PROPORTIONALITY ANALYSIS

Proportionality analysis is not concerned with determining what rights we have.[37] It is concerned with determining the extent to which the rights we have may justifiably be limited by the state, but there is no doubt that this determines how meaningful the rights we have will turn out to be.

As Barak puts it, proportionality is "the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible" (p. 3).[38] There are subtle variations in proportionality analysis across legal systems, but it is common for courts to ask these four questions, and to place the burden of justification on the state:

> 1. Is the limit on the right established for a proper purpose?;
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> 2. Are the means adopted to achieve that purpose rationally connected to the achievement of that purpose? (rationality);
>
> 3. Are the means adopted necessary to achieve that purpose, in the sense that alternative means could not achieve the purpose while limiting the protected right to a lesser extent? (necessity); and
>
> 4. Is there proportionality between the gain in achieving the purpose and the loss occasioned by limiting the protected right (proportionality *stricto sensu*)?

The purpose of each of these questions differs considerably. The first three establish a means-end analysis: the state's purpose is identified and the effectiveness and impact of the means chosen by the state to achieve that purpose are considered. Barak spends a good deal of time discussing the propriety of a state's purpose in limiting rights—the sorts of state purposes that can, in principle, justify the establishment of limits on rights and the degree of urgency that is required in realizing proper purposes. But there is almost always a good reason for states to establish limits on rights, especially given the tendency to define the protected rights broadly. Given Barak's concession that "most rights are relative

37. See Grégoire C.N. Webber, *On the Loss of Rights*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13.

38. Elsewhere in the book, Barak describes proportionality as establishing "a uniform analytical framework for any state action that may affect constitutional rights . . . a structured method of thought . . . that should not be identified with any 'right-wing' or 'left-wing' social theories" (pp. 459–60).

in nature and therefore can be limited" (p. 250), the only question is why a court would intervene at the first stage of the inquiry—why, that is, a court would conclude that legislation is unconstitutional on the basis that it disapproves of the state's end rather than the means chosen to achieve that end.

The most important issue at the first stage of the proportionality inquiry is one of characterization—whether a law will be accorded a general or more specific purpose. For example, legislation requiring health warnings on tobacco products can be understood, in general, as an attempt to protect people from health risks.[39] More specifically, however, it may be understood as an attempt to discourage people from smoking.[40] The former characterization makes the law seem more important and might be thought to support the establishment of more extensive limitations on the freedom of expression. That is, a more important end is likely to provide the state with greater latitude when it comes to questions of means, given the range of policy options available.[41]

Barak offers a complicated subjective-objective inquiry for identifying a proper purpose, but at the end of the day it is difficult to avoid the conclusion that the attribution of purpose to legislation that limits rights is more or less discretionary in nature. That being so, the important questions concern means-end fit.[42] There are two considerations here: rationality and necessity.

Rationality receives relatively brief treatment by Barak. Law that limits rights need not achieve the state's purpose completely; it is enough that the law contributes to the achievement of that purpose, provided only that the contribution be more than marginal or negligible (p. 305). In contrast to his approach to determining purpose, Barak's approach to rationality leaves little room for judicial discretion. The question is empirical: does the means chosen by the legislature contribute meaningfully to achieving the

39. This is how Alexy characterizes it. *See* ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 8, at 402 (describing the proportionality of mandatory warnings on tobacco packages as a limit on the freedom of occupation that is "obvious" in terms of its justification, approving of the decision of the German Federal Constitutional Court in BVerfGE vol. 95, 173).

40. *RJR-MacDonald, Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 (Can.) (majority of Court finding law banning tobacco advertising and requiring unattributed warnings on tobacco packages an unjustified limit on freedom of expression).

41. *See also* WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 12, at 72–75.

42. Martin Luterán, *The Lost Meaning of Proportionality*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13.

legislature's end? If so, the law is rational, even if the court considers that better policy choices could have been made.

On Barak's approach, the rationality step in proportionality analysis is largely a waste of time. Legislatures simply do not pass irrational laws, given the minimal sense of rationality Barak contemplates. We would be better off without this step, lest courts take it too seriously.[43]

Barak concedes that the concept of rationality could be discarded (p. 316).[44] Thus, means-end fit boils down to the requirement of necessity. Necessity is a difficult test that invites second-guessing about legislative policy choices. Judges often make the claim that the state should not go after a fly with an elephant gun, but this is rarely a fair appraisal of a necessity problem. There are likely to be subtle rather than dramatic variations between the options that were considered and the one that was chosen, and choices are likely to be made in situations of imperfect knowledge. A limit on a right is necessary if there is no alternative approach to achieving the state's purpose that limits the right to a lesser extent, but this question depends on a court's ability to determine that the alternative approach fulfills the state's purpose "quantitatively, qualitatively, and probability-wise" (p. 324). The notion that these questions can be answered on the basis of evidential submissions in judicial proceedings is difficult to take seriously, and this difficulty goes to the heart of the problem: Proportionality analysis purports to be based on objective evidence. That judges have no plausible claim to the policy-making expertise the analysis requires is simply beside the point.

The necessity test is the most important step in Canadian proportionality analysis, and most laws that are found to be unconstitutional fail on the basis that the limits they establish are not necessary. In short, they go too far in limiting rights. Barak once considered that the demonstration of necessity was at the "heart" of the proportionality analysis,[45] but he now resiles from

43. Discussion of rationality features prominently in Canadian law, but there are few examples of cases in which a law has been held unconstitutional on the basis of irrationality. Ironically, the Supreme Court of Canada held that a law presuming that drugs were possessed for purposes of trafficking was unconstitutional on the basis of irrationality in *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.), the case that established proportionality analysis in Canadian law, but it is widely considered that the Court's conclusion is erroneous.

44. "We will admit it is not that significant. Its entire purpose is to provide a quick solution in extreme cases where the incongruence between the means and the purpose is obvious, and by that to expedite the process of constitutional review" (p. 316).

45. *United Mizrahi Bank*, *supra* note 6, at ¶ 95.

that view. Necessity is important, he says, but proportionality *stricto sensu* is the most important step in proportionality analysis (pp. 337–39).

In taking this position Barak aligns himself with the weight of proportionality scholarship. He acknowledges that it is easier for a court to conclude that a law is unjustified on the basis that it is badly designed—that the same purpose could be achieved in a manner that limits rights to a lesser extent—than it is to conclude that a properly designed law is unjustified because the rights-interests tradeoff it effects is disproportionate *stricto sensu*. The former conclusion entails only a failure of "Pareto optimality,"[46] a failure that can—at least in theory—be demonstrated on the basis of objective evidence.[47] The latter conclusion is problematic because the interests and rights on both sides of the proportionality scale are incommensurate: they can be neither measured nor weighed by a common metric.

The determination of proportionality *stricto sensu* depends on discretionary judgments as to the inputs and the weight the court chooses to assign to them. As a result, it is often said that the concept is arbitrary.[48] This appears to be borne out in practice. A conclusion that a limit on a right is proportional or disproportional is more likely to be declared than demonstrated.[49]

The objection from incommensurability is significant, and yet there is no denying that judgments made under the rubric of proportionality may reflect shared intuitions about justice, and to

46. Barak (p. 320 n. 12) cites Julian Rivers, *Proportionality and the Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 198 (2006): "A distribution is efficient or Pareto-optimal if no other distribution could make at least one person better off without making any one else worse off. Likewise an act is necessary if no alternative act could make the victim better off in terms of right-enjoyment without reducing the level of realization of some other constitutional interest."

47. I say "in theory" because the concept of Pareto optimality is fraught with difficulty in the context of social policy choices. As Larry Alexander pointed out in his comments to me, legislatures typically have mixed rather than singular state goals, and any alternative policy is likely to disserve one or more of the state's goals to some extent.

48. Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, RATIO JURIS 131 (2003) (replying to JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg, trans., MIT Press 1996) (1992)); *cf.* Frederick Schauer, *Balancing, Subsumption and the Constraining Role of Legal Text*, *in* INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 307 (Mattias Klatt, ed., 2012); Timothy Endicott, *Proportionality and Incommensurability*, *in* PROPORTIONALITY AND THE RULE OF LAW, *supra* note 13.

49. Grégoire Webber makes the same point in WEBBER, THE NEGOTIABLE CONSTITUTION, *supra* note 12 at 89: "[T]he way in which the principle of proportionality generates particular conclusions is difficult to discern: concluding whether legislation 'strikes the right balance' or is 'proportionate' in relation to constitutional rights is, in many instances, asserted rather than demonstrated" (footnotes omitted).

that extent may seem unobjectionable. Everyone would agree, for example, that a penalty of life imprisonment for the crime of shoplifting would be excessive—overly severe or, we might say, out of all proportion to the harm caused by commission of the crime. We could go further and describe the penalty as not simply disproportionate but *grossly* disproportionate. Everyone would agree that such a penalty would be unjust, but of course this example is easy precisely because such penalty would never be imposed. It is so far beyond our experience as to be unthinkable in any civilized country, and branding the law "disproportional" involves no judgment of moment. Once we move beyond the range of extreme hypotheticals, however, the nature and quality of justice are contestable and the shortcomings of proportionality are laid bare.

Consider the penalty for murder, a crime of a different order of magnitude than shoplifting. Murder is the ultimate immoral action; it is taboo in every religion and culture and prohibited by law in every civilized society. But despite unanimity on the immorality of murder, there is no consensus on the proportionality of particular punishments for the crime. Some states have capital punishment; some states penalize murder with life imprisonment without possibility of parole; and some states have finite sentences that permit early release. Reasonable people disagree about which of these approaches is preferable, but all of these punishments—even capital punishment—can be defended using the language of proportionality.[50]

The shortcomings of proportionality analysis are not limited to the most serious laws. Consider an anodyne regulatory requirement, such as a law requiring that people be photographed in order to obtain a driver's license. The purpose of such a law is, presumably, to protect the integrity of the drivers licensing system, but a photograph requirement establishes a limit on the freedom of religion of those whose understanding of the Second Commandment prohibits photographs, and in a legal system committed to proportionality the question is whether the photograph requirement can be justified despite the limit on

50. As I was writing this, the European Court of Human Rights concluded that English law allowing "whole life" sentences without the possibility of parole violated article 3 of the European Convention, which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Vintner and Others v United Kingdom* (July 9, 2013). The Court's decision emphasized the importance of rehabilitation rather than punishment, without explaining why the state was not permitted to prefer the latter to the former.

freedom of religion it effects. This is precisely the sort of claim about which reasonable people are bound to disagree, and so it comes as no surprise that it divided the Supreme Court of Canada in *Hutterian Brethren v. Alberta*.[51]

Judicial decisions in these sorts of cases betray the fact that the outcome of proportionality analysis is influenced by unspoken assumptions about the importance of particular rights and their exercise in particular circumstances. A judge who is unsympathetic to a particular rights claim is less likely to find the establishment of a limit on the relevant right to be disproportionate than a judge who considers the right important, and hence considers the limit on the right to be more significant. The difference is clear in the *Hutterian Brethren* case, in which the majority trivializes a freedom of religion claim the minority characterizes as "dramatic."[52] Barak acknowledges the problem, as we will see, but his approach to dealing with it raises as many questions as it answers.

PROPORTIONALITY AND THE "CULTURE OF JUSTIFICATION"

Proportionality analysis is often justified on the assumption that it is synonymous with justification, and it goes without saying that requiring justification for state action is a good thing. Proportionality is said to establish and support a "culture of justification," a phrase coined by Etienne Mureinik, in his discussion of the then-nascent *South African Constitution*. Mureneik expressed his hope that South Africa could overcome its racist, authoritarian past and become democratic. In an oft-quoted passage he stated:

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to

51. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.). The Court split 4:3 in upholding the constitutionality of the law.

52. Writing for the majority of the Court, Chief Justice McLachlin noted that the Hutterites, who live in remote rural communities, had options including hiring drivers as necessary: "While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale." *Hutterian Brethren* at ¶102. Abella J, writing for the minority, describes the harm to the freedom of religion of the Hutterites as "dramatic": "Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community." *Id.* at ¶ 114. Ironically, both sides cite an earlier article by Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. Toronto L.J. 369 (2007).

> a culture of justification—a culture in which *every* exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.[53]

Mureneik's "culture of justification" is usually invoked without regard to the South African context in which he coined the phrase. In well-established constitutional democracies, justification does not depend on the possibility of judicial review. Consider Australia, which has no national bill of rights: its laws are justified in democratic political terms.

Barak's endorsement of the "culture of justification" (p. 458) is best understood as reflecting a normative preference for legal over political constitutionalism—in short, for rights-based judicial review. The motivation for this is well expressed by Cohen-Eliya and Porat:

> [The culture of justification] is based on rationalism and elitism that are thought of as bulwarks against the prejudice and irrationality of unchecked popular democracy. In contrast to the culture of authority, the culture of justification is not content with authority and legitimacy based on populism. It is suspicious of letting popularly elected bodies decide for themselves, and requires instead that they provide justification for their actions to external professional and elitist bodies, such as the courts.[54]

Barak is an unabashed elitist when it comes to judicial review. Although he is forced to acknowledge the relevance of majority rule, his conception of democracy diminishes its importance by separating the "formal" and "substantive" aspects of democracy:

> Democracy is not merely majority rule. Democracy is also the rule of fundamental values and human rights as expressed by the constitution. Democracy is a delicate balance between majority rule and fundamental values that control that majority. Democracy is not only "formal democracy" (which is primarily concerned with the election process of the representative institutions guaranteeing the majority rule). Democracy is also "substantive democracy" (which is primarily

53. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994) (emphasis added).

54. Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 483 (2011).

> concerned with the protection of human rights) . . . Remove majority rule from the constitutional democracy, and you have offended its very nature. Take fundamental-value rule away from a constitutional democracy, and you have offended its very existence. [55]

Barak insists that there is no basis for concern about the democratic legitimacy of judicial review once the decision has been made to adopt it.[56] In effect, the democratic pedigree of a decision to adopt judicial review immunizes the exercise of judicial review authority from criticism on democratic grounds. This is a strong point, and it is undermined by Barak's qualification that the decision to adopt judicial review reflects the democratic will of the people *even if the decision is implicit*.[57]

But the larger problem is that the democratic pedigree of the decision to adopt judicial review has nothing at all to say about how judicial review should be practiced—what its scope is or ought to be, and in particular whether proportionality analysis should be employed. The most that can be said is that the people have, through democratic means, authorized the judiciary to exercise the power of judicial review. It does not follow that each and every exercise of judicial power is democratically legitimate. Again, only a judge could say such a thing. But most judges at least affect modesty when it comes to exercising their power, and most are cautious in exercising their power to invalidate legislation no matter how well established a court's judicial review authority may be. Consider the various ways in which American judges may seek to limit the scope and impact of judicial review

55. CA 6821/93 United Mizrahi Bank v Migdal Coop. Vill. 49(4) IsrSC 221 [1995] (Isr.), quoted in Barak (p. 253). Barak's conception of democracy is the sort that Allan has characterized as "fat": See James Allan, *Thin Beats Fat Yet Again—Conceptions of Democracy*, 25 LAW & PHIL. 533 (2006).

56. Barak is not the first judge to make this claim. Writing in the early days of the Canadian Charter of Rights and Freedoms, Justice Lamer of the Supreme Court of Canada rejected an argument warning of the dangers of judicial activism as follows:

> This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

In re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 497 (Can.).

57. This qualification is necessary given Barak's role in constitutionalizing the Basic Law and judicial review. Given that role, it is more than a little presumptuous of him to declare democracy-based concerns irrelevant. *See supra* note 6.

by applying doctrines such as mootness, ripeness, or political questions, or the various avoidance techniques set out in the *Ashwander* doctrine.[58] Judges in other jurisdictions are not quite so cautious, but most are likely to take a deferential approach to judicial review, even when they have no concerns as to its legitimacy. Barak has little time for the concept of deference, however, as discussed below.

PROPORTIONALITY AND MARGINALITY

Recall that the first three steps in proportionality analysis are concerned with means-end fit—identifying what the legislature is seeking to accomplish and how it is going about accomplishing it. It is relatively easy to satisfy the first two steps in the analysis—to conclude that the law limits rights in pursuit of a proper purpose and that the steps it takes in pursuit of that purpose are rational. Legislatures in well functioning democracies do not pass laws for no reason nor are they likely to act irrationally, in the minimal sense that Barak's concept of rationality contemplates.

The third step in the analysis, which asks whether the limit established on the right is necessary in order to achieve the state's purpose, is controversial because, as we saw earlier, it invites second-guessing by the court on a counterfactual question: whether another means of achieving the state's end—a policy option not chosen by the legislature—would be equally effective in achieving that end while establishing a lesser limit on the right. Judges who are confident about their policy-making expertise may find it easy to conclude that this step in the proportionality analysis has not been met, and may even downplay the consequences of their conclusion by pointing out that there is scope for the legislature to redesign the law in question to minimize the rights limitation, and so pass constitutional muster.

The fourth step, proportionality *stricto sensu*, is the most important step and the most difficult, for it involves a weighing/balancing of the law and the limit it establishes on the right. Barak seeks to overcome these difficulties with his concept of "marginality."

Now, not everyone acknowledges the difficulty of determining proportionality *stricto sensu*. David Beatty has

58. Ashwander v Tenn. Valley Auth., 297 U.S. 288 (1936). The *Ashwander* doctrine is reviewed and criticized in Fred Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71.

argued that proportionality is essentially a matter of fact and that objective answers are possible.[59] For his part, Robert Alexy asserts that some proportionality answers are simply "obvious." To his credit, Barak acknowledges that proportionality necessarily involves an element of "judicial subjectivity"[60] (p. 479). The comparison between the benefits of realizing a law's purpose and the cost to a right that the law occasions is "of a value-laden nature" (p. 342). There are different political and economic ideologies to consider, along with the history of the country, the structure of its political system, and its distinct social values (p. 349).[61]

But Barak thinks that the difficulties with proportionality *stricto sensu* can be overcome by clarifying and limiting the comparison with which courts must be concerned:

> [I]t is important to note that the comparison is not between the importance of fulfilling the purpose of the limiting law and preventing the harm to the constitutional right. Rather, the comparison focuses only on the marginal effects—on both the benefits and the harm—caused by the law. In other words, the comparison is between the margins (p. 350).

If the problem with proportionality judgments is that they are more likely to be declared than demonstrated, Barak's attempt to address the problem adds layers of technical complexity to the analysis. Judges must reconsider alternative laws—lesser rights-limiting approaches that did not fulfill the purpose of the law, and so were not considered viable alternatives at the necessity step in the analysis—and determine whether any of these alternatives would, if enacted, be proportional *stricto sensu*. Barak explains:

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59. BEATTY, THE ULTIMATE RULE OF LAW, *supra* note 26, at 166–76 (footnotes omitted):

> Turning conflicts about people's most important interests and ideas into matters of fact, rather than matters of interpretation or matters of moral principle, allows the judiciary to supervise a discourse in which each person's perception of a state's course of action is valued equally and for which there is a correct resolution that can be verified empirically.

Id. at 171.

60. But while Barak insists that judges cannot impose their own values on society, he cannot promise that this will not occur, and his admonition comes across as elitist: Judges, he writes, "should balance between the different interests in accordance with what they view as the best interests of the society of which they are a member" (p. 479). He does not explain why judges are better placed to determine the interests of society than the political community, to which everyone belongs.

61. These are, of course, the very sorts of considerations that make comparative constitutional law so difficult.

> Thus, on the first scale—that of "fulfilling the proper purpose"—we place the marginal social importance of the benefits gained by rejecting the possible alternative and adopting the proposed law, while on the scale of "harming the constitutional right" we place the marginal social importance of preventing the harm caused to the constitutional right from rejecting the possible alternative and adopting the proposed law. The question examined in this scenario is which has the heavier weight on the scales (p. 353).

There may be many reasons that explain why an alternative approach was not chosen by the legislature, but Barak downplays the significance of the legislature's decision. As long as the hypothetical alternative advances the purpose a judge thinks that the legislature sought to achieve, that is sufficient. If the alternative is proportional and the legislature's choice is not, then the law is unconstitutional.

Barak minimizes the impact of unconstitutionality based on a failure of proportionality *stricto sensu*:

> The legislator is not required to return to the drawing board, to its position before the limiting law was introduced. Rather, the legislator can reduce the "damage" of the unconstitutionality. It can do so by legislating the alternative. That way, benefits will be gained and the harm reduced in comparison to the situation before the law's enactment (p.356).

He acknowledges, as he must, that in legislating the alternative the state is not getting the benefits it wanted under the original law. But something is better than nothing; the legislature can always pass the alternative law, Barak says, and "partial fulfillment should satisfy the legislator's policy considerations" (p. 356).[62]

A court's ability to weigh policy alternatives depends on several additional considerations, and these considerations require the exercise of discretionary judgments. For example, Barak states that the probability of the state's social goal being realized if the rights-limiting measure is approved must be considered (p. 358),[63] but this necessarily involves conjecture. On

62. The trouble is that it is not easy to pass legislation—to generate the required political consensus to pass legislation following a judicial decision invalidating a law—because judicial decisions change the political dynamic. But even if it were easy to pass alternative legislation, Barak does not explain why partial fulfillment of legislative purpose should satisfy the legislator.

63. "The weight of an important purpose, whose realization is urgent and the probability of its actual occurrence is high is not equal to the weight of a similarly important purpose, whose realization is also urgent but whose probability of occurrence is extremely low" (p. 358).

the other side of the scale, the weight of the marginal social importance of minimizing the limitation of the right depends largely on the "social importance" of the right, in addition to the scope of the limitation the law establishes on the right and the probability that the limit on the right will be realized.

The concept of "social importance" is fraught with difficulties. Although bills of rights do not distinguish between the importance of the rights they protect, it seems reasonable to suppose that some rights are more important than others. This appears to be borne out in the case law, given that it seems easier to establish limits on some rights than others. It is also possible to observe the existence of hierarchies *within* particular rights. For example, courts may be more solicitous of some types of expression (*e.g.*, political expression) than others (*e.g.*, pornographic), regardless of their commitment to the importance of freedom of expression in the abstract. Yet most bills of rights do not establish hierarchies of rights: all constitutional rights enjoy the same legal status.

Given the nature of Barak's enterprise—the weighing of marginalities—he is forced to address the matter head on: he must acknowledge, in other words, that his methodology not only permits but requires different rights to be accorded different weights in the proportionality evaluation. This is where the concept of social importance comes in. According to Barak, some rights have greater *social* importance than others, even if their legal importance is identical. Which rights? And how do we identify them?

Barak's answer is brief: some rights are preconditions to the realization or enjoyment of other rights and are more socially important as a result. On this basis Barak asserts that the rights to life, human dignity, equality, and political speech have increased social importance. Once again, we find categorical pronouncements backed by little or no analysis. But on this topic in particular, so important to his theory, Barak's failure to attend to the distinctions he asserts is glaring. He acknowledges that there may also be distinctions within the rights he identifies as being of higher order importance, but provides no basis for drawing the distinctions his approach to proportionality requires. Here is all that he says:

> Rights that advance the legal system's most fundamental values and that contribute to the personal welfare of each member of the community differ from rights that rely upon general welfare considerations as their only justification.

> Similarly, "suspect" rights, which historically have been limited by the majority for improper reasons, differ from rights that are not "suspect" in that way. The different perspectives at times suit one another. In other cases, they point in different directions. We must assume that, with time, it will be possible to establish more specific criteria on the matter (p. 361).

Putting all of this together, Barak proffers a "basic balancing rule":

> The higher the social importance of preventing the marginal harm to the constitutional right at issue and the higher the probability of such an additional marginal harm occurring, then the marginal benefits created by the limiting law—either to the public interest or to other constitutional rights—should be of a higher social importance and more urgent and the probability of its realization should be higher (p. 363).

Barak's basic balancing rule is rendered concrete by the application of a specific rule of balancing in particular cases, operating at a lower level of abstraction. But Barak goes further, suggesting that there is a need for a third rule of balancing, which he describes as "principled" balancing. And within the context of principled balancing, Barak contemplates individuated approaches across and within particular rights: "The number of principled balancing formulas relating to constitutional rights is much higher than the number of constitutional rights" (p. 544). These balancing rules are complicated, to say the least, but Barak defends their complexity on the basis that it is necessary to take into account differences in the social importance of particular constitutional rights.

PROPORTIONALITY AND DEFERENCE

Given the complexity of the analysis Barak advocates, it might be supposed that the need for deference is clear. After all, deference is a familiar concept in administrative law and potentially has purchase at various steps in the proportionality inquiry where limitations on rights are concerned. To defer to a decision on a question of constitutional rights is, in general, to uphold the constitutionality of limits on rights on the basis that they are reasonable, as opposed to "correct" (from the Court's perspective). As Barak puts it:

> [W]e can define deference as a situation where a judge adopts an opinion expressed by another branch of government (either the legislative or executive) regarding the components of

> proportionality when, without this expression, the judge would not have adopted that opinion (p. 398).

Deference is significant because it mitigates the impact of judicial review and in particular the impact of the judicial power, and is advocated for principled and prudential reasons.[64] But deference is also advocated for tactical reasons, as a means of quelling opposition to judicial review. For example, Mattias Kumm states: "The fact that a court engages in proportionality analysis does not imply anything about the degree of deference it should accord political actors. . . . [A] court can inquire *more or less searchingly* whether the relevant prongs of the test are satisfied."[65]

Deference appears to have no meaningful role to play in Barak's conception of proportionality because judicial exclusivity is his bedrock: judges must determine all of the questions when it comes to the law. Barak draws on *Marbury v. Madison* for authority: "It is emphatically the province and duty of the judicial department to say what the law is."[66] The Court simply must exercise this responsibility, he writes: "Any other approach would lead to anarchy within the system" (p. 394).

Anarchy is a bit much, and so is Barak's assertion that "[t]he approach that a judge should defer to the legislative or executive branches does not fit a constitutional democracy" (p. 399). Although Barak argues that all levels of government must apply proportionality analysis whenever limits on rights are to be established, and acknowledges that discretion is involved in making the proportionality determinations, he insists that the judiciary is the only branch of government whose view of the requirements of the constitution matters: "Any other solution would seriously impede democracy" (p. 387). Barak acknowledges that legislatures legislate on the basis of social and

64. *See* Aileen Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, *in* EXPOUNDING THE CONSTITUTION, *supra* note 12, at 184; *see also* Aileen Kavanagh, *Defending Deference in Public Law and Constitutional Theory*, 126 Law Q. Rev. 222 (2010); Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, 60 U. TORONTO L.J. 23 (2010).

65. Kumm, *Socratic Contestation*, *supra* note 30, at note 55 (emphasis added). Elsewhere Kumm has enumerated four relevant considerations for deference, but these are stated at a high level of generality and he does not explore them in any detail. Kumm, *Democracy is Not Enough: Rights, Proportionality, and the Point of Judicial Review,* NYU Public Law and Legal Theory Working Papers , Paper 118 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356793; *see also* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 200-03 (2013) (emphasizing a concept of deference as reasonableness (as opposed to correctness) in reviewing answers reached at the *stricto sensu* stage of proportionality analysis).

66. 5 U.S. 137, 177 (1803).

polycentric facts that are not necessarily accommodated by the rules of evidence, but insists that courts are as capable of learning from legal argument as legislatures are from legislative committee processes.

So confident is Barak in the ability of judges that he dispatches the idea of deference in four pages. First, he cites what he describes as the three most common justifications for deference: "the lack of democratic legitimacy for judging; the lack of institutional capacity; and finally, judicial wisdom" (p. 398). This is followed by the announcement: "None of these justifications is proper" (p. 398). Not only is deference improper on rights questions, but in public law more generally. Barak dispatches *Chevron*[67] deference in judicial review of administrative action in a paragraph. The literature is rich but the doctrine is "misplaced," he asserts, for it undermines the judicial function set out in *Marbury*.

There is indeed an enormous body of work on deference, much of which is written by proponents of proportionality, but Barak does no more than list it in a footnote (p. 397 n. 71).[68] His conclusion appears to be categorical:

> [Deference] has no place when the question is the proportionality of a limitation on a constitutional right. . . . [T]here is no room to argue that there are certain categories of cases, like national security or emergencies, where the judge should exercise deference to the legislative or executive authority. . . . The approach that a judge should defer to the legislative or executive branches does not fit a constitutional democracy (p. 399) (footnotes omitted).

But it turns out that Barak will countenance deference, at least to some extent, albeit under a different name. For example, he endorses the Supreme Court of Canada's approach to the necessity branch of the proportionality test, which upholds a limit on a right provided that it is *reasonably* necessary, or limits a right as little as *reasonably* possible. Although this is widely understood as deference in Canadian law, Barak says that it simply reflects the fact that legislation is not a science, and there may be a range of choices that satisfy the requirements of proportionality.

67. *Chevron U.S.A., Inc. v. Natural Resources Def. Council,* 467 U.S. 837 (1984). A similar deferential approach is well established in Canadian administrative law, reiterated most recently in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R 190 (Can.).

68. In a subsequent footnote he states: "There are those who are of the opinion that judicial deference should be exercised in certain circumstances" (p. 397 n. 81).

But recall that the fourth step in proportionality analysis—proportionality *stricto sensu*—is the most important to Barak, and he is unwilling to defer at this step. Thus, deference at the third step in the analysis is a cost-free concession. Proportionality is, for Barak, ultimately a legal question for judges to decide, and on his account it is to be judged strictly rather than deferentially.

CONCLUSION

The shift to rights-centred constitutionalism signified by the adoption of bills of rights in most democratic countries renders judicial review on rights questions inevitable, and courts will necessarily be involved in adjudicating matters of public policy. Like most proponents, Barak regards proportionality analysis as necessary and inevitable. All that remains, then, is the perfection of its methodology.

I doubt that the problems posed by proportionality analysis can be resolved by rendering the methodology pure. One thing that should be clear, however: proportionality analysis leads to a considerable expansion of judicial power, especially in the hands of a confident practitioner like Barak.